No. 12590.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. McCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

OTTO CHRISTENSEN,
1212 Spring Arcade Building, Los Angeles 13,
JOHN J. IRWIN,
5658 Wilshire Boulevard, Los Angeles 36,
Attorneys for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Dictionary

No. 12590.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. MCCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. MCCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

Statement of Basis of Jurisdiction.

This is an appeal from a judgment rendered against the appellants by the District Court of the United States for the Southern District of California, Central Division, upon a verdict finding appellants guilty of violation of the Migratory Bird Treaty Act (U. S. C., Title 16, Sec. 703, *et seq.*) and the regulations relating thereto. Charges contained in the information for alleged violation occurred on or about October 22, 1949. [Information, R. 2; Verdicts, R. 9-13; Judgments, R. 52-63.] A fine of $500.00 was imposed against each appellant. [R. 52-63.]

The District Court allegedly had jurisdiction under 22 U. S. C., Sec. 41(2), and this Court has jurisdiction under 28 U. S. C., Sec. 225(a).

Thereafter the appellants duly filed Notice of Appeal from said judgments within the time prescribed by law. [R. 64.] Then, contemporaneously therewith, the appellants filed their Designation of Grounds on Appeal. [R. 65.]

Thereafter, appellants filed within the time prescribed by law their Designation of Record on Appeal [R. 69], and a Statement of Points on Which Appellants will Rely on Appeal, together with a Designation of the Parts of the Record necessary for a consideration of their appeal. [R. 69, 477.]

Thereafter, the record in this case, including the transcript of all of the testimony and evidence, together with all of the exhibits, separately and directly certified, were filed with the Clerk of this Honorable Court, together with a statement of points to be relied upon on appeal. [R. 477-478.]

Statement of the Case.

The Information.

> "The United States Attorney charges: That on or about October 22, 1949, in Ventura County, California, . . . the defendants . . . without being permitted so to do by any regulation made, adopted, and approved under authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did take, hunt and kill, migratory waterfowl and migratory game birds over baited ponds and areas, by means, aid and use of shelled grain, namely, barley and cracked lima beans, which said grain and beans

had been deposited, distributed and scattered over said ponds and areas so as to constitute a lure, attraction and enticement to said migratory game birds; contrary to the provisions of the Migratory Bird Treaty Act and the Regulations relating thereto, as duly proclaimed pursuant to law (Regulations relating to migratory birds, approved and proclaimed by the President on July 29, 1948, 13 F. R. 4411, as last amended July 29, 1949, (2) 14 F. R. 4798, Part 1, Chapter 1, Subchapter B, Title 50, Code of Federal Regulations)."

Pertinent Facts in Evidence.

The appellants consist of farmers, businessmen and public officials who had either been born or resided for many years in and about the City of Oxnard, Ventura County, California. The appellant, Maxwell, an attorney, had been United States Commissioner for the District, President of the County Bar Association of Ventura County, and had served on the Draft Board. The appellant, Carty, at the time of the trial, was Mayor of the City of Oxnard, which position he had held for six years. He was Past President of the League of California Cities and of the National Association of Municipal Legislators, and had an interest in conservation work for 30 years, having been president of many sportsmen's clubs, Ventura County Gun and Rod Club, the Southern Council of Wardens, Southern California Sportsmen, and State Sportsmen's Council. In addition, at the time of his trial he was a member of the California Fish and Game Commission, and was such a Commissioner on appointment of two governors. There was uncontradicted evidence of the excellent and good character of the appellants. [R. 265, 344, 451.]

The appellants were all members of the Santa Clara Gun Club where the alleged violations were said to have occurred. The Club consisted of about nine members. [R. 265.] A small acreage was used during the duck season, but this was otherwise a part of a large ranch and out of season was operated by this ranch. The appellants, Maxwell, Carty and James McCormick, were the only defendants who testified, it being stipulated that the testimony of the remaining appellants would be cumulative. [R. 265, 266, 344, 394, 429.]

In season the Club occupied an area of approximately 40 acres, situated in the middle of a section known as the McGrath Ranch that contained a series of dikes, which could be converted into ponds by the introduction of irrigation water. Forty-one sacks of grain were distributed on the grounds of the Club prior to the opening of the 1949 duck season, each sack consisting of 90 pounds, or in all approximately 1¾ tons. [R. 394-395.] Seventy-five per cent of this only was grain and the balance was chaff, radish seed and other foreign matter; or, an approximate scattering of grain of 1⅜ tons. [R. 398.] The last of the grain was distributed on the morning of October 13, 1949. The shooting season opened at noon on October 21, 1949. [R. 401.]

Previously, on October 8, 1949, 36 sacks of dried lima beans weighing about 100 pounds to the sack was put out on the southwest corner of the Club. The appellants James McCormick and H. McCormick, operated the farm in the middle of which the Gun Club was situated and also the land of the Gun Club out of season. They were under contract with the sub-lessee, a pimiento raiser, to protect his crop from mudhens which were very destructive to pimientos; in the hope of keeping the mud-

hens out of the pimientos at the distant southwest corner, in advance of the distribution of the grain for pre-season duck feeding, they put out the lima beans. [R. 405, 406.] The lima beans were not put out as duck feed, as it had been the previous experience that ducks would not eat lima beans. [R. 405.] The record discloses only slight difference of opinion as to lima beans not constituting duck feed, the great weight of the testimony being that it did not. [R. 312, 326, 332, 337, 344, 351, 389, 392, 408, 418, 422, 256, 259, 264, 279, 283.] There was some testimony that it did under exceptional circumstances and if the ducks were very hungry. [R. 126, 209, 213, 332.]

The testimony discloses that the authorities advised the appellants that the distribution of feed for ducks should be made not later than from 3 to 10 days prior to the opening of the shooting season. [R. 240, 418, 419, 427.] The appellant, James McCormick, in distributing the 41 sacks of grain, had used a broadcaster rather than spreading it directly from the sacks so as to stretch the cleanup of the small quantity of grain spread. The evidence of the government discloses that a duck will eat a half pound of grain per day [R. 341]; that at noon, on October 21, there were 15,000 ducks on the club property. [R. 245.] There was expert evidence of the defense that 9 sacks of grain was eaten in 22 minutes by an estimated 10,000 ducks. [R. 392.] There was evidence from a warden that there were several thousand ducks there on October 18. [R. 400.] Two or three thousand ducks would clean up the actual net 1⅜ tons of grain within two days. [R. 401.] The ducks taken were less than the limit and aggregated in all thirty-seven. [R. 207, 214.]

On the 14th day of October, when McCormick observed that the ducks in number had not increased, he went to

Ojai and talked to Mr. Getman, who was a game warden [R. 315], about the poor flight of ducks, and expressed doubt that the feed would be cleaned up before the opening of the shooting season; game warden Getman stated he would check into the matter and let him know. [R. 399-400.] Getman testified that Mr. McCormick had visited him at appellant Carty's suggestion. [R. 316.] Getman also testified that his diary disclosed that he had a talk with McCormick on October 14, and that it included a talk with Game Warden John Spicer on the 15th day of October, at which time Mr. Getman told Mr. Spicer exactly what Mr. McCormick had told him. [R. 316-317.]

In the afternoon of October 18 or October 19, together with appellant Vincent Doud, they (McCormick and Doud) noticed a Fish and Game car around the Club property driving along slowly on the road just above the Club, and they waved to him, and he waved back but speeded up and drove off. That since the game warden didn't stop, McCormick concluded that he had checked the Club and that everything was all right. [R. 403.]

James McCormick met Mr. Jack White, Ventura County Game Warden and Deputy State and Federal Warden, October 18, three days prior to the opening of the shooting season and inspected the Club property thoroughly. After this inspection, White said: "Jim, you needn't worry; the ducks will have it cleaned up. You now have two or three thousand ducks here and I am sure it will be all right." [R. 400.]

Game Warden White testified that his diary reflected that on the 18th of October, at 10 o'clock in the morning, he met appellants James McCormick and Maxwell, and at Maxwell's request went with said appellant McCor-

mick and made an inspection of the Club's premises and found some beans around the road and a little scattered barley, and that he told said appellant McCormick that it appeared from the number of birds present that it would be cleaned up and that he didn't think there was anything to worry about and saw no reason why they shouldn't go ahead and shoot. [R. 417.] Warden White made a second inspection on October 20 and his diary reflected "had a little feed still out and some beans the ducks won't eat. Feed had been out for some time." [R. 417-418.]

Joe Paul, County Editor of the Ventura Star Free Press, testified that following the alleged violations he had a talk with Warden Elder on October 24, 1949, and the Club "had been more or less under observation for some time . . . they had been watching the club." [R. 414.]

Deputy Warden Jack Bedwell [R. 71] stated that he was at the Club a couple of hours before the season opened at noon October 21 [R. 115], and that he used binoculars in observing what transpired on the Club's property [R. 74]; that as a result of the comment of a hunter on the Club's premises that afternoon "that there had been a few lima beans left on the road," he revisited the Club's premises about six o'clock that evening, together with Warden John Spicer. [R. 474-475.] That the hunter who told him that there were a few lima beans left on the road was appellant James McCormick. [R. 75.] Appellant James McCormick testified that after he came in from the blinds after the shooting season opened on October 21 he saw Warden Bedwell, together with a guest, and appellant Vincent Doud. [R. 401.] That he and Bedwell were at a distance of about 60 to 70 yards from

the beans and they could easily be seen, and that as they talked together he pointed to them; that he told Bedwell that the lima beans had been put out there and suggested that he cover them up, and that Bedwell replied "I think that would be a good idea." [R. 401-402.] The ducks were not eating any of those lima beans. [R. 403.]

Strange that lima beans, which even Bedwell doesn't consider normal duck feed [R. 126], should inspire the evening Spicer-Bedwell inspection, and also stranger, for McCormick to mention them and thereby invite investigation of the premises if the premises were baited with grain. Apparently he had no guilty conscience on the subject of the existence of grain on the premises in an amount that would constitute bait under the law.

McCormick further testified that upon appellant Maxwell's return the night of the 20th of October he was told by Maxwell that Macklin, the supervisor of all game wardens in Southern California, stated that if the barley was substantially cleaned up it was all right to go ahead and shoot; that he notified Eugene Doud, president of the Club, to advise the members of the Club that everything was all right and to go ahead and shoot. [R. 404.]

Warden Jack Bedwell testified that when as a result of this conversation with McCormick he visited the premises of the Club with Warden Spicer the evening of October 21st, they with the aid of flash-lights moved about the premises of the Club and found some barley grain which appeared to have been scattered and in some areas was thick enough "to scoop it up with our hands." [R. 76.] Warden Spicer, of this nocturnal flash-light inspection, testified that Bedwell had informed him that he had seen quite a large quantity of feed on the premises of the Club. [R. 149.] That he proceeded with Bedwell to

the Club and wherever he flashed his light he saw barley grain on the ground. [R. 149-150.] Agents Bedwell and Spicer and Elder testified to having seen barley grain at various points on the premises as well as the lima beans on the southwest corner of the property, as described by appellant James McCormick.

The existence of barley grain on the dikes, the ponds and the premises of the Club as of the time of the alleged violation October 22, 1949, and immediately prior to the opening of the season at noon on October 21, in quantities to constitute a violation by shooting over baited ponds as alleged in the information, was sharply controverted by defense witnesses, the testimony being to seeing insubstantial quantities, to none at all; also the government's witnesses were in conflict with each other and even themselves. Even the government witnesses had the quantity as low as 3 or 4 buckets. [R. 411, 189, 344, 361, 288, 289, 341, 392.]

Game Warden Elder testified that after being phoned by Game Warden Spicer concerning his visit to the Club premises on the evening of October 21 with Game Warden Bedwell he went out on an expedition of his own at one o'clock on the morning of October 22. Elder said that he received his information from Spicer about 8:30 on the evening of October 21. [R. 178.]

Game Warden Welsh testified that on October 21 he was working the northern part of Kern County and the south part of Tulare County with agent Elder. Approximately at noon on October 21 (which would be before the opening of the season and before Bedwell could have communicated with them) Elder told him "he had a report that there had been some feeding of ducks on the Club of which Mr. Carty was a member." [R. 311.]

Also that Elder told him that "he didn't believe beans constituted a bad factor in baiting of ducks." [R. 312.]

Another Game Warden, Les Arnold, at whose house Warden Spicer phoned Elder, testified that after the call Elder said, "that Spicer, the boys had found some grain on the Carty club." [R. 343.] Further, he testified that he saw Warden Elder on Sunday, October 23, the day after the alleged violations, and that he asked him what he did over there, and that Elder said,

> " 'Well, they pinched the Carty club.' He then said, 'How much grain did you find?' He said, 'Oh, three or four bucketsful and a lot of beans.' Then he said 'Well, I am not so excited over the beans, as I don't figure these ducks will eat beans.' " [R. 343-344.]

Earl Macklin, Chief Warden in charge in the Southern California area [R. 319] testified that appellant Maxwell consulted him on October 19, 1949, two days before the opening of the season. [R. 321.] That Maxwell stated that he had informed Game Warden Edgerton that the Club had not put out any feed subsequent to October 13. [R. 323.] That Maxwell said that state wardens (also deputized as Federal Wardens) in that area, particularly Spicer, had been unfriendly, and that Spicer harbored some resentment against club members because certain members of the Club had taken part in retaining Mr. White on his job as Ventura County Game Warden. [R. 324.] Macklin told Mr. Maxwell that he would instruct Spicer to contact him whenever anything came up in the area which involved enforcement against clubs in the area. That he told Mr. Maxwell that Game Wardens and Captains were instructed not to make technical arrests; that if the Club was reasonably cleaned up that there wouldn't be any ar-

rests made. That the day following Mr. Maxwell's visit he had a talk with Spicer concerning Maxwell's visit and talk; that Spicer at that time said that he had not inspected the clubs in the area as to the amount of feed that might be remaining; that he told Spicer that "he might the next morning make a round of the clubs or check with the other wardens in the area to find out if they had inspected the clubs"; that he told Spicer to contact him if he found anything that involved the clubs; that Spicer did not report back to him after the 20th until the 26th of October. [R. 326-327.] That he had a conversation with Warden Elder [R. 325] concerning events that took place on the 22nd, and that Elder agreed that beans were a very poor feed for ducks. [R. 326.]

Game Warden White told Maxwell on the 18th of October that he had checked the Club and considering the ducks that were there and the amount of feed that remained, "It should be sufficiently cleaned up." [R. 299.] Appellant Maxwell stated that prior to the morning of October 22, 1949, he had not been on the club premises since summer. [R. 277.] That it was pitch dark when he went to the shooting blind. [R. 285.] After he and appellant Doud had shot their limit of ducks (five each) [R. 285] they left their blind from which they were shooting and proceeded only a short distance when accosted by Game Warden Spicer and Game Warden Elder [R. 287] who said, they were under arrest for shooting over-baited ponds. Elder said at that time he could pick up hands full of grain on the marsh and that he could go around and scoop up three or four boxes full. Maxwell responded that it would take very little time for the ducks to pick up a few bucketsful of grain and "You know I am beginning to get an inkling of this case. This case has a rotten smell to me." [R. 289.]

Maxwell said he had just come in from the blind and had not seen any grain. [R. 189.]

About three weeks before the opening of the season Maxwell had conversed with Warden Edgerton regarding regulations. [R. 267.] Edgerton said that they had advised certain clubs to stop feeding ten days before the season, and that he knew of no change that feeding would be permitted up to 72 hours before shooting, but that he would consult with his superior Mr. Macklin. [R. 267-268.] Maxwell did not hear from Edgerton after that. [R. 272.] Not hearing from Edgerton, Maxwell contacted Warden White on the 17th day of October, 1949 [R. 273], and at his insistence Warden White inspected the Club and reported back that he felt that the amount of feed on the Club was not unreasonable and in his opinion would be cleaned up before the shooting season started.

All game wardens are required to keep a diary and make written reports to Mr. Macklin. [R. 320.] Warden Spicer testified that he had not been to the Club for a week prior to the opening of the season, October 21. [R. 164.] Spicer's weekly reports taken from his diary under date of October 16 read, "With Palmer U. S. F. S. to Santa Clara riverbottom, gun clubs." He identified the club in question as being in the Santa Clara river bottom. [R. 444.] Warden Getman testified that on the 15th day of October he had notified Spicer of his conversation with McCormick with respect to inspecting the Club. [R. 317.] Spicer denies having a conversation with Warden Getman. [R. 444, 165.] The entry on October 21, in his diary and report reads, "To Santa Clara riverbottom and gun clubs checking hunters." [R. 442.]

Spicer testified he talked with Warden White at 9 o'clock in the morning on October 21, 1949, who informed

him that he had checked all the clubs, and that he didn't see any reason why they couldn't go ahead and shoot. [R. 175-176.] Yet Spicer didn't see any necessity of notifying the club or its members of the apparent violation of baiting regulations following his inspection of the premises on the night of October 21. [R. 176.]

Warden Spicer testified that it was customary for all clubs to put out feed some time prior to the opening of the season. [R. 174.] Warden Elder testified "there is nothing illegal about feeding before the shooting season, * * * ." [R. 210], that "it was not a matter of the length of time the feed had been out before the ducks were hunted, it was the fact that the grain was there at the time the hunting took place * * *." [R. 186.]

Warden Edgerton told appellant Maxwell that feeding within 10 days before opening of season had been mutually agreed upon as proper practice, as feed should be eaten up by the opening day of shooting season; that this time for feeding had been agreed upon by Wardens Spicer, Muldoon, White and himself; that the clubs were so advised by them. [R. 240, 242.]

Warden Bedwell, who was on the premises shortly after noon of the 21st and to whom appellant McCormick gave the information about the lima beans, states that he had a conversation with appellant Carty on October 21st, which "consisted of asking of Mr. Carty if he had gotten his limit of ducks, and he said that he had, and he asked me if I brought my shotgun along and invited me to hunt on the club." [R. 118.] If there had been bait on the premises Mr. Carty obviously wouldn't invite its disclosure.

Bedwell testified that his inspection of the premises on the evening of the 21st was "possibly . . . 45 minutes."

[R. 141.] That it was the remark of Mr. McCormick regarding the lima beans that caused him to contact Warden Spicer. [R. 125.] The game wardens then met at 7 o'clock on the morning of October 22 and pursuant to a prearranged signal, surrounded the Club, observed the shooting from blinds with the use of binoculars, and then moved in and made arrests of all present. [R. 77, 83.] That he understood that the Club had been under observation by Agent Elder. [R. 254.]

Warden Spicer's superior, Mr. Macklin, interviewed him on October 26 with reference to the conditions of the Club which led to the arrests; Macklin testified that he talked to Spicer at that time regarding how much feed was on the Club, and that Spicer was rather indefinite about the amount of feed. [R. 327-328.] That he told Spicer that he was preparing a report for the San Francisco office and would like him to make an estimate. Whereupon Spicer replied, "Well, I don't know how much was on there, what did Elder say." [R. 328.] Spicer said he didn't think there was as much as Elder estimated, and when asked if there was a ton, he replied, "Well, somewhere between a ton and two tons." [R. 328.]

Exhibit "M" [R. 364], Government Regulations, which were handed out to the public and the appellants, and which was the subject of discussion between appellant Maxwell and Warden Macklin [R. 267] contained instructions to consult with "appropriate State officers" regarding its provisions. Both Federal Deputies, White and Edgerton, as well as the Supervisor Warden Macklin, had informed appellants that feed was permissible variously from approximately ten days to three days before the shooting season. [R. 240, 418, 427.] The only grain that was distributed on the premises of the Club was approximately

ten days before the season with a mechanical spreader [R. 395-396]; the lima beans were put out earlier.

Elder, who inspected the premises a few hours following the inspection on the evening of October 21 by Wardens Spicer and Bedwell, testified that after he had passed cross-dike No. 5, on middle dike, there was barley "in very heavy dribbles where it appeared to me a sack had been carried over someone's shoulder, allowing barley to leak out where it was carried, with here and there a little pile or so, approximately—I estimated at the time five or 10 pounds in each pile. . . . I found grain in the water. It looked like more than two sacks had been dumped in one place . . . on the south dike near No. 4." [R. 180-181.] The grain put out by the Club was broadcast by a mechanical spreader. [R. 395.]

The ducks confiscated were placed in the evidence locker of the Los Angeles cold storage plant and were there at the time of the trial; they were not offered in evidence or was there testimony concerning the contents of their craws. [R. 208.]

Elder testified that all of the wardens watched with field glasses on the early morning of October 22 the operations of the Club. [R. 183.] That they had an agreed plan of action. [R. 184.] That he talked with appellant Maxwell at the time of his arrest. [R. 188.] That Maxwell said he smelled something rotten in the whole deal and looked at Mr. Doud and said "Jack White." Whereupon, Elder "expressed to him Jack White hadn't anything to do with the matter," and that he had inspected the ponds during the night and had found "more grain than there should have been there," to which Maxwell replied, "I just came in from my blind and have not seen a bit of grain." Elder

then said, "I could have scooped three or four or more bucketsful of samples from places," and to this Maxwell replied, "That couldn't have been, because they had stopped feeding at least 10 days before." [R. 188-189.]

The Issues as Submitted to the Jury by the Court.

The Court in its instructions read the regulation proclaimed on July 29, 1948, which is as follows:

> " 'Waterfowl (except for propagating, scientific, or other purposes under permit issued pursuant to Section 6.8), and mourning doves and white-winged doves are not permitted to be *taken,* directly or indirectly, by means, aid, or use of shelled, shucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them: Provided, however, such birds may be taken over properly shocked corn and standing crops of corn, wheat, or other grain or feed, and grains found scattered solely as a result of agricultural harvesting.'
>
> "Thus, this regulation which I have just read to you has the effect of law, since it was propounded under the authority of the Migratory Bird Act of 1918, as amended." [R. 454-455.]

The Court (over objection [R. 464]) then gave Government Instruction No. 19-A [R. 26, 457]:

> "You are instructed that the regulations concerning the baiting of migratory birds is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens, whereupon the hunters may flush them as they walk

or punt over the preserves, or by directly placing the grain or other feeds in front of the blinds or stands during the season.

"Furthermore, concerning the provisions in the regulation that migratory birds are not permitted to be taken 'directly or indirectly' by means of bait, you are instructed that the word 'indirectly' equally applies to any luring of the birds by grain or other feed to the hunting area, regardless of whether the grain or other feeds is spread before the bird blinds themselves or is more widely scattered." [R. 457-458.]

The Court Failed to Submit the Issue of Entrapment to the Jury.

The Court refused to give any instructions whatever on the subject of entrapment. The defendants requested the following instructions on the subject:

"The defendants in this case have raised the defense of entrapment. You are instructed that the first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. When the criminal design originates, not with the accused, but is conceived in the minds of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor. (Case cited.)

"Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. (Case cited.)

"There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. (Case cited.)

"You are, therefore, instructed that if you have first concluded beyond a reasonable doubt that the defendants have committed the acts alleged in the information, that having so concluded, you are further satisfied that prior to their commission the defendants never conceived any intention of committing these offenses, or any similar offense, but that the officers of the government incited and by suasion and representations lured them to commit the offenses alleged in order to entrap, arrest, and prosecute the defendants therefor, then these facts are fatal to the prosecution of these offenses, and the defendants, and each of them, are entitled to a verdict of not guilty." [R. 31, 33.]

"The defendants have raised the defense of entrapment. The natural and logical approach to this subject of entrapment must be through the application of the doctrine of estoppel. Individuals, in dealing with each other, are not permitted to assert rights or enforce remedies when their own acts induced another to commit the wrong out of which arose the right sought to be enforced. Estoppel is founded on morality and justice, and especially concerns conscience and equity. Although the government is a sovereign, it is not permitted to adopt means which are condemned by the courts when practiced by its citizens. If the conduct of government agents be unconscionable, if it be intentionally deceptive and de-

signed to induce, and does induce another to do something which he would not have otherwise done, the wrongdoer is not, and should not be, permitted to profit thereby. Sound public policy estops the government from asserting that an act which involves no criminal intent was voluntarily done when it originated in and was caused by the government agents' deception. (Case cited.)

"If you find, therefore, that the government agents, by their conduct, as appears from the evidence in this case, caused the defendants to do the acts complained of and which from the evidence it appears they would not have otherwise done except for such conduct, then you are instructed that defendants are entitled to a verdict of not guilty. (Case cited.)" [R. 37-38.]

The appellants objected and excepted to the Court's failure to instruct on the issue of entrapment. [R. 465, 468, 470.]

Specifications of Error Upon Which Appellants Will Rely.

ERROR I:

The Court erred in failing to submit the issue of entrapment to the jury and in refusing to give to the jury appellants' requested instructions, or any of them, on the issue of entrapment, which said instructions are set forth, *supra,* at pages 17-19 of this Brief.

ERROR II:

The Court erred in giving Government Instruction No. 19-A, which is set forth, *supra,* at pages 16-17 of this Brief.

ARGUMENT.

I.

Under the State of the Evidence the Trial Court Should Have Submitted the Issue of Entrapment to the Jury Under the Proper and Applicable Instructions Requested by the Appellants.

It is our contention that the Court erred in failing to give any instruction on entrapment whatsoever, either on its own motion, or as requested by the appellants. Such an instruction was required under the state of the evidence on two aspects of the case: (1) The evidence of inducement to put out pre-season feed for the ducks, in the light of the Court's instruction that the regulation was violated by feeding before the season opened "so as to keep the birds in the hunting area to be shot after the season opens," and (2) evidence of enticement and inducement to shoot after the season opened over alleged baited ponds.

A summarization of the following facts established alone, required the giving of a proper instruction on entrapment:

1. The appellants were highly respected, law-abiding citizens of good character.

2. That no intent existed or was conceived in the minds of any of them to violate the law, but on the contrary they scrupulously and meticulously sought the counsel of authorities in respect to their every act relating to their small Gun Club; they were told that it was permissible to put out feed for ducks variously from three days to ten days in advance of the opening of the season. They were told that this was what the various agents involved in the ar-

rests had agreed upon as a proper practice; they were told there was nothing illegal about feeding before the shooting season; they were told "it was not a matter of the length of time the feed had been out before the ducks were hunted," but that violation would only result from "the fact that the grain was there at the time the hunting took place."

3. The Government regulations themselves, "Exhibit M," which the appellants possessed, advised them to consult with appropriate State officers regarding its provisions. Although the Deputy Wardens were, with the exception of Elder, State and County Wardens, they were also deputized as Federal Game Wardens.

4. The only grain distributed on the premises of the Club was a small amount approximately ten days before the season opened, and was put on with a mechanical spreader, pursuant to the advice of these Game Wardens that it was permissible to put out pre-season feed.

5. That a duck will eat a half pound of grain per day and that there were ducks present in such number as to have consumed all the grain that had been put out prior to the opening of the season; also there was substantial evidence that all of the grain had been consumed prior to October 22.

6. Although the grain was distributed by means of a mechanical spreader, twelve days later, on October 22, Warden Elder on his late evening or early morning inspection found piles of five or ten pounds of grain—"that it was in heavy dribbles and appeared as if the grain had been allowed to leak out where it was carried," and also that he found grain in the water; Wardens Spicer and Bedwell had covered the grounds on an inspection tour

a few hours before Elder's inspection. There was evidence of spleen and bitterness between Warden Spicer and some of the appellants. The evidence of the defense was that there were no piles or heavy dribbles of grain and that the only grain that they had put out had been broadcast with a mechanical spreader. Also Warden Arnold's testimony that Warden Elder told him that all he found on the Club's premises was a few buckets of grain and some beans; and concerning the beans Elder told him he didn't figure the ducks would eat these beans; Elder also agreed with Chief Macklin, beans were very poor feed for ducks.

7. On October 14, the appellants contacted Game Warden Getman and expressed doubt that the feed would be cleaned up before the opening of the shooting season; that Game Warden Getman stated that he would check into the matter, and on the 15th he advised Warden Spicer of appellants' talk with respect to inspecting the Club. Warden Spicer denied that Getman so told him, but his diary disclosed that on October 16 his activities were ". . . to Santa Clara River Bottom, gun clubs," and he identified the club in question as being in the Santa Clara River Bottom; on October 18 appellants noticed a Fish and Game car around the Club property driving along slowly; that they waved to the person in the Fish and Game car, and that this person waved back but speeded up and drove off; that since the Game Warden did not stop they concluded that he had checked the Club and that everything was all right.

8. That three days prior to the opening of the shooting season Federal Warden Jack White inspected the Club property thoroughly at the request of appellants and were told that they had nothing to worry about; that with the

two or three thousand ducks then present the feed would be cleaned up; White said he found some beans around the road that the ducks wouldn't eat and a little scattered barley, and that he told appellant McCormick it wasn't anything to worry about, and that he saw no reason why they shouldn't go ahead and shoot. Warden White made a second inspection on October 20, and his diary reflected "had a little feed still out and some beans the ducks won't eat. These have been out for some time."

9. The Chief Warden in charge of the California area (Macklin) was consulted by appellants two days before the opening of the season; he was informed that Warden Spicer had been unfriendly and harbored some resentment against club members; Macklin told appellant Maxwell that he would instruct Spicer to contact him when anything came up in the area which involved enforcements against clubs in the area; that he had instructed the game wardens and captains not to make technical arrests; that if the club was reasonably cleaned up that there wouldn't be any arrests made.

In an extensive reading of the cases on entrapment, we have found no case on the facts which so strongly establishes the lack of conception of any intention to commit these offenses, and on the other hand of incitement, inducement, suasion and representations by Government officers, luring appellants to commit acts, and considered by them innocent acts, which now form the basis of the alleged offenses in this case.

Probably the leading case involving entrapment is *Sorrells v. United States,* 287 U. S. 435, 77 L. Ed. 413, 86 A. L. R. 249. In that case, the majority of the Supreme Court held that entrapment was a jury question, "and that the trial court was in error in holding that as

a matter of law there was no entrapment and in refusing to submit the issue to the jury."

In the case of *Capuano v. United States* (1 C. C. A.), 9 F. 2d 41, it was held that the Court erred and the case reversed. The Court refused an instruction on the hypothesis that the accused never conceived bribing prohibition agents, but was incited and lured into committing offenses by Government officers in order to entrap him and charging instead that the fact that officers offered the defendant a chance for bribing them was no defense, unless the agents went to the defendant for the purpose of framing him, or having defendant give a bribe.

In *Louie Hung v. United States,* 111 F. 2d 325, the Court stated:

> "The court properly instructed the jury on the subject of entrapment. (Citing cases.) The jury were entitled to conclude from the evidence that the intent and purpose to violate the law were present and that the officers had done no more than furnish appellant the opportunity of committing the offense. It is enough to say that the showing of entrapment was not so clear as to entitle appellant to an acquittal as a matter of law."

In the case of *United States v. Brandenburg,* 162 F. 2d 980, 982 (3rd C. C. A.), the Court stated:

> ". . . (citing cases) But *Cf.* Morei v. United States, 6 Cir., 1942, 127 F. 2d 827. In the Morei case, *supra,* the court, stressing the fact that government agents had induced the defendant to violate the law, cited the minority opinion of the Sorrells case to

> support the conclusion that entrapment had existed as a matter of law. . . . Examination of the charge of the court in the instant case reveals that the entrapment question was fairly and adequately submitted to the jury."

In the case of *Myer v. United States,* 67 F. 2d 223, this Court reviewed numerous decisions on the subject of entrapment. In this case, the Court said:

> "The inconsistencies and contradictions in the testimony of the witnesses were, of course, a question for the jury, and, needless to say its determination thereof is binding on this Court."

This Court said the trial court had "fully and clearly instructed the jury on the law relating to entrapment, in accordance with the definition thereof stated by the Supreme Court in the Sorrells case. . . ."

See also:

United States v. Kendall, 165 F. 2d 117, 119 (7th C. C. A.), and

Jindra v. United States, 69 F. 2d 429, 431.

The case of entrapment made out in this case is so clear as to bring it under the rule entitling appellants to an acquittal as a matter of law.

Morei v. United States, 167 F. 2d 827;

Sorrells v. United States, 287 U. S. 437, 454.

II.

The Court Erred in Giving Government's Instruction No. 19-A.

This instruction appears in full, *supra,* at pages 16-17.

The jury might well have concluded from the evidence that there was no grain or other duck feed whatsoever or in insufficient quantities on the premises as to constitute a lure at the time the ducks were taken, but could come to no other conclusion but what grain had been put out prior to the season opening, as the facts of pre-season feeding were admitted; and, under the Court's instruction had to find appellants guilty.

The evidence disclosed that about one and five-eighths tons of barley grain was spread in the hunting area approximately ten days previous [R. 395, 399] by permission of the various game wardens. [R. 240, 242, 418, 427.] A duck will eat a half pound of grain a day. [R. 347.] There was evidence that on the opening day of the shooting season, October 21, and immediately prior thereto, there was such a quantity of ducks present, that in one day they would have consumed more than all of the duck feed (the grain) which had been spread approximately ten days before. [R. 245, 341, 392, 189, 344, 361, 288.]

The evidence of the defense was that on the 22nd of October there was no barley grain on the premises; that none was observed as being on the premises; and what, if any, that remained on that day was at most an infinitesimal quantity scattered in the pickle weed inaccessible to the ducks and in such an insufficient amount as not to be considered bait for the ducks. (See page 9, *supra.*)

The ducks were on watered ponds at the opposite of the southwest corner where there was evidence of lima

beans having been placed by the farmers, who were farming the Club's premises, for the purpose of attracting mudhens away from pimiento fields which lay on the north of the Club's property and close to where the ducks were concentrated on the watered ponds. There is no evidence that any of the ducks confiscated had lima beans in their craws, although they were in the Government's possession even at the date of the trial, and the overwhelming evidence was (including witnesses of the Government) that it did not constitute duck feed. [R. 405, see pages 4-5, *supra.*]

There is only evidence that appellants Carty and James McCormick [R. 117] shot on the 21st, as well as the 22nd of October. There is evidence that one Stevenson [R. 411], a guest, shot on the 22nd, but saw no grain on the premises.

The regulations read to the jury by the Court prohibits the *taking* of birds "directly or indirectly, by means, aid, or use of shelled, shucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement, *to, on, or over the area where hunters are attempting to take them.*" (Emphasis added.)

The normal practice of all clubs, and because of instructions from the enforcing officials pursuant to their interpretation of the regulation, is to feed in advance of the shooting season, conditioned upon the duck feed being consumed prior to the opening of the shooting season. [R. 186, 210, 240, 418, 427.]

The Court gave confusing and repugnant instructions in submitting the issue as to what constitutes a violation of the Migratory Bird Treaty Act regulations.

Under these instructions one violated the Act even though prior to shooting one had inspected the premises and the inspection disclosed no grain, duck feed or bait whatsoever; and even though this be a fact, that, nevertheless, said person, even though he be a guest, could be found guilty if there had been any previous feeding attracting the ducks to the area so that they could be shot after the season opens. [R. 456-457.]

The Court instructed that "hunters shall investigate at their peril the conditions surrounding the fields and areas in which they are doing their hunting. [R. 456.] . . . He was under a postive duty to investigate for such conditions before hunting in the area," and the regulation "is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens [R. 457] . . ." And "that the word 'indirectly' equally applies to any luring of the birds by grain or other feed to the hunting area." [R. 458.]

Obviously the Court's instruction interpreting the regulation as being violated by "indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens," is an improper interpretation and application of the regulation, as the prohibition is against luring, attracting or enticing by feed "to, on, or over the area where hunters are attempting to take them." The "lure," "attraction" or "enticement" *is* "to, on, or over" the area where the hunters are presently attempting to take them.

This instruction is a reiteration of the dictum of Justice Denman in *Cerritos Gun Club v. Hall,* 96 F. 2d 620, 624. There an appeal was taken from a decree dismissing without leave to amend a bill seeking to enjoin Federal offi-

cers from prosecuting the petitioners for luring, with grain, migratory game fowl to their properties, there to be shot by their stockholders and members. Among the averments of the bill, which the dismissal required this Court to accept as true, was that the furnishing of accommodations and opportunity to hunt were "made possible of accomplishment only by luring and keeping the migratory game there, through distributing over the premises barley grain upon which the birds can subsist and . . . as alleged, their occupants and users will cease to use them unless the duck clubs bait the premises to lure the game there." Thus in the *Cerritos* case there was an undisputed factual situation, of persistent and continuous feeding, carried out not during the closed season, but during the open shooting season.

We say that the referred to dictum of our now Chief Judge Denman is dictum because it was wholly unnecessary to a determination of the validity of the Migratory Bird Treaty Act and the regulations promulgated in pursuance of the Act. The dictum apparently resulted from taking a different view than that expressed by the Court of Appeals in *Cochrane v. United States,* 92 F. 2d 623; Justice Denman said that he did not "agree with the dictum of that case that bringing the line of flight of wild fowl by baiting to a hunting territory, is not 'indirectly' a 'luring' within the meaning of the regulation," observing that he believed "the appellants have violated the Secretary's regulation whether by pursuing the indirect method of baiting before the season opens to keep the birds there to be shot after the season opens . . ." Further that it was dictum appears from the fact that the pleading in the *Cerritos* case alleged continuous feeding of the area during the shooting season. This fact placed them in violation of

the regulation as such, leaving only the question of the validity of the regulation. The regulation was held to be valid by all of the judges in their separate opinions.

Neither Justice Stephens nor Justice Healy adopted the views of Justice Denman in their opinions, but both agreed with each other and Justice Denman in the conclusions reached, that the judgment of the lower court in dismissing the bill should be affirmed, which cannot be said to be an approval of this instruction taken *haec verba* for Justice Denman's single opinion.

It is interesting to note that Justice Healy observed (p. 631):

> "The matter in controversy in this suit, is the right to *take* migratory birds by means of baiting. Appellants have undertaken to champion that right. . . . It is without point to say that, except for the regulation, the appellants would be free to distribute grain on their lands or to put out feed which will attract wild ducks. *The regulation does not prohibit that. It prohibits taking ducks with the aid of baiting;* . . ." (Emphasis our own.)

Also, at page 629, in commenting on the significance of the word "indirectly" in the regulation, Justice Denman states: "that 'indirectly' clearly applies to any luring by grain of the birds to the hunting areas, *regardless of whether the grain is spread before particular blinds or more widely scattered.*" This latter statement is consonant with the observation of Justice Healy, but not with the dictum which formed the basis of the challenged instruction.

In the case of *Cochrane v. United States, supra,* on appeal from a conviction of violating the Migratory Bird

Treaty Act and its regulations, the appellants challenged the sufficiency of the evidence to support the finding of guilt; the evidence disclosed the appellants were in hunting clothes, possessed shotguns, a shotgun was fired, and thereupon ducks arose from the pond near a blind; shortly before the shot in question witnesses saw employees of the gun club dump corn into the water about 150 yards from the blinds; that in the course of an hour the corn floated in and about wooden decoys which were placed a short distance in front of the blinds. Of this situation, the Court held that the evidence established a violation of the regulation, saying at page 628:

> "It is unnecessary for us to define the limits of this section inasmuch as the facts in the instant cases fall clearly within it on any reasonable construction of it.
>
> "We do not understand that this regulation prohibits the placing of corn, wheat, oats or other grain, or any other kind of feed whatsoever, into rivers, lakes or ponds to induce and entice water fowl to take a certain route in their migration. *It is not the feeding of the birds that is condemned but rather the feeding of them in such a way as to lure them close to a blind wherein hunters are lodged that is prohibited.*" (Emphasis our own.)

The instruction as given to the jury tells them that the "indirect method" consists of pre-season feeding, as distinguished from the "direct method" of placing the feed in front of shooting blinds during the season. We believe that this instruction is faulty and is contrary to the views expressed by Justice Healy and those of the Seventh Circuit. Apparently the enforcement officers also have a contrary view, since they advise that feeding may

take place within a reasonable time prior to the opening of the season. By the Court's instruction, the jury was told that any feeding, no matter when it occurred (and that could be from ten days to thirty days, or even longer, before the opening of the season), to keep the birds there to be shot after the season opens was a violation. This means that even though the feed had been disposed of weeks in advance of the shooting season, if any birds were presently in the area where the feed had been scattered—which, of course, in spite of the original scattered feed having been consumed frequently occurs because of the presence of natural duck feed—it would nevertheless be a violation. It is a matter this Court can take judicial notice of that even in the absence of natural feed or any feeding whatsoever in the area, that fresh water itself is a basic attraction to ducks; we know that ducks not only eat but must drink fresh water in the course of their long flights of migration.

We assert that the only reasonable interpretation of the regulation is against luring, attracting, or enticing by feed "to, on, or over the area where hunters are attempting to take them." This would indicate that it must be the taking of ducks "with the aid of baiting." The taking of ducks by the aid of baiting may be direct by placing feed in front of blinds, or, indirectly by scattering the feed over a wider area; but in any event, the baiting must be contemporaneous with the taking or attempted taking of the ducks. As said by Judge Evans in *Cochrane v. United States, supra,* at page 628:

> "Clearly any regulation which is destructive rather than promotive of wild game life would be void. Equally clear, we think, is the legislative intent to permit duck and geese hunting."

Every regulation should receive sensible construction. General terms should be limited in their application so as not to lead to injustice, oppression and an absurd consequence. The Supreme Court has said it will always, therefore, be presumed that the legislator intended exceptions to its language which would avoid results of this character, and that the reason of the law in such cases should prevail over its letter. (*Sorrells v. U. S.*, 287 U. S. 434, 447, 777 L. Ed. 413, 419.) We go further and say that the Court's instruction in this instance even does violence to the letter of the regulation. We know that the Court's interpretation of this regulation and that of the enforcement authorities, and upon whose instructions and advice the appellants acted, is entirely different. A regulation (or statute) which forbids the doing of an act in terms so ambiguous that men of common intelligence must necessarily guess as to its meaning violates the first essential of due process of law. (*Connally v. General Construction Co.*, 269 U. S. 385, 391; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 87-88.) Such ambiguity cannot be cured by judicial construction which seeks to specify "details of the offense intended to be charged." (*Lanzetta v. New Jersey*, 306 U. S. 451, 453.)

In *Screws v. United States*, 325 U. S. 91, Justices Roberts, Frankfurter and Jackson, in a joint dissenting opinion, said at page 153:

> "What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, pre-

cisely because it is a process, cannot avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite."*

In *Screws v. United States, supra,* at page 154, it was further stated:

"Federal prosecutions must be founded on delineation by Congress of what is made criminal. To base federal prosecutions on the shifting and indeterminate decisions of courts is to sanction prosecutions for crimes based on definitions made by courts. This is tantamount to creating a new body of federal criminal common law."

In *United States v. Wiltberger,* 5 Wheat. (18 U. S.) 76, 96, Chief Justice Marshall said:

"To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

In *Pierce v. United States,* 314 U. S. 306, 311, the Supreme Court said that a "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

---

*Every law, in a broad sense, is a regulation, and, conversely, every regulation is a law. Each is a command of the legislators and regulates human conduct or behavior. In criminal law it imposes criminal punishment, and in civil law it creates and commands its performance under threat of execution.

In *Kordel v. United States,* 335 U. S. 345, 348-349, the Supreme Court said:

> "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States v. Resnick,* 299 U. S. 207; *Kraus & Bros. v. United States,* 327 U. S. 614, 621-622), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated. *United States v. Sullivan,* 332 U. S. 689, 693; *Winters v. New York,* 333 U. S. 507."

The rule now under discussion is well illustrated by the decision in *France v. United States,* 164 U. S. 676, 682-683.

In *Viereck v. United States,* 318 U. S. 236, 243, the Court said:

> "The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

See *United States v. Evans,* 333 U. S. 483, 486, where the Court said:

> ". . . there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions."

Further the instruction was faulty (a) for failure to define what is meant by "whereupon the hunters may

flush them as they walk or punt over the preserves"; and (b) for instructing on a matter which was not in issue by any evidence whatsoever.

The words "*flush* . . . as they walk" and "*punt* over the preserves" may have some meaning to a seasoned hunter in Eastern States, but hardly to a California hunter and much less to a lay jury. In Southern California, as with this Club, the hunting is done from blinds set in artificial dykes surrounded by water.

The word "punt" for example is not such a word of general usage as to give it common understanding and meaning. Even its dictionary meaning requires a lawyer's skill to read meaning into it as applied to duck hunting. Webster's New International Dictionary defines "punt"—"To propel, as a punt, by pushing with a pole."

We apprehend that what the trial court attempted to do was to say that pre-season feeding which lures ducks to a hunting area, enabling the hunters after the opening of the shooting season while walking the preserves to flush ducks out or by (punt) a pole, propel them out to be shot, violates the regulation. Had the instruction been so framed it still would have been bad for all the reasons above given to the one which the Court did give. But this is not what the Court said—what he did say was that the regulation was violated by (1) pre-season feeding which kept the birds in the hunting area to be shot after the season opens, and (2) "whereupon the hunters may flush them as they walk or punt over the preserves."

Mere 'flushing" or "punting," during either the "open" or "closed" season in areas in which feeding goes on, itself is no violation; it is the actual taking or shooting of the birds that is condemned.

The "flushing" and "punting" phase of the instruction was a confusing and ambiguous redundancy. To leave the jury without the "rudder ~~or~~ and compass" of the applicable meaning of these terms was an invitation to conjecture and miscarriage of justice.

Too, there was no basis in the evidence for an instruction on taking birds by the method of "flushing" and "punting." There was no evidence of any "flushing" or "punting." In fact the evidence affirmatively established that the hunting was from blinds set in dykes surrounded by water and that the premises were not adaptable for any such method of hunting as flushing or punting. By this instruction a wholly false and unwarranted issue was introduced into the case.

The erroneousness of not defining the terms "flush" and "punt," and introducing an unwarranted false issue is so academic as not to require the citation of any authorities.

In summary, the Court submitted the question of guilt to the jury upon three issues:

1. Lima beans. (a) Was it duck feed? If, yes; then (b) was it present in such quantities as to constitute a lure, and (c) was it in such proximity to the hunting area as to constitute a lure.

2. Grain. Was grain present in the hunting area at the time of taking of the ducks, and if so, was it present in such quantities as to constitute a lure.

3. Was grain put out as pre-season feed which kept the ducks in the hunting area, although consumed prior to the opening of the shooting season.

The jury came into Court during the course of its deliberations of two days and announced three distinct times that it could not agree upon a verdict. [R. 471-474.] One may reasonably infer from this, that in view of the overwhelming evidence that lima beans was not duck feed that the jury had a reasonable doubt on issue (1) above; likewise that such a doubt existed as to issue (2) above, in view of the affirmative evidence of no grain being present at the opening of the season, the small quantity of pre-season feed put out, the eating habits of ducks, the conflicting evidence of government witnesses as to the amount of grain present and the impeachment testimony of one game warden who was a friend of the government's primary witness that this government witness had only found a few buckets of grain on the Club's premises. This inescapably points up issue (3), the erroneous instruction on pre-season feeding, as the one which the jury after very lengthy deliberations resolved against the defendants.

Conclusion.

It is accordingly submitted that error of a prejudicial character has been established in connection with each of the specifications relied upon.

It is submitted that the judgment should be reversed.

Respectfully submitted,

Otto Christensen,

John J. Irwin,

Attorneys for Appellants.